Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 Blackboard, Inc. Petition for Expedited Declaratory Ruling Regarding Reassigned Wireless Telephone Numbers	)	CG Docket No. 02-278

COMMENTS OF TWITTER, INC. IN SUPPORT OF BLACKBOARD, INC.'S PETITION FOR EXPEDITED DECLARATORY RULING

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TABLE OF CONTENTS

Twitter, Inc. ("Twitter") submits these comments in response to the Commission's Public Notice seeking comment on Blackboard, Inc.'s Petition for Expedited Declaratory Ruling seeking, among other things, a declaration that calls to wireless numbers are made with "prior express consent" for purposes of the Telephone Consumer Protection Act ("TCPA") when the wireless number has been provided to the caller by a consumer as a means of contact, even if that number has subsequently been reassigned to another consumer, and that "called party" for purposes of the exemption from TCPA liability for calls made with the "prior express consent of the called party" means the intended recipient of the call.[1]

The Commission has previously sought comments on four other petitions raising these issues.[2] Twitter filed comments and letters in support of those petitions, and met with Commission staff to discuss the impact of the TCPA on Twitter and its users.[3] Twitter renews its call for the Commission to clarify that a caller does not violate the TCPA simply by calling or texting a wireless phone number for which the caller previously obtained consent to call, but which subsequently was reassigned to another consumer without the caller's knowledge. A

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[1] Blackboard Inc. Petition for Expedited Declaratory Ruling, CG Dkt. No. 02-278 (Feb. 24, 2015) ("Blackboard Pet."). Blackboard also asks the Commission to rule that calls made by its customers do not violate the TCPA because they are made for "emergency purposes." Twitter does not take a position on this issue at this time.

[2] *See* United Healthcare Services, Inc.'s Petition for Expedited Declaratory Ruling at 2-3, CG Dkt. No. 02-278 (Jan. 16, 2014) ("United Healthcare Pet."); Stage Stores, Inc. Petition for Expedited Declaratory Ruling, CG Dkt. No. 02-278 (June 4, 2014) ("Stage Stores Pet."); Rubio's Restaurant, Inc. Petition for Expedited Declaratory Ruling, CG Dkt. No. 02-278 (Aug. 11, 2014) ("Rubio's Pet."); Consumer Bankers Association Petition for Declaratory Ruling, CG Dkt. No. 02-278 (Sept. 19, 2014) ("CBA Pet.").

[3] *See* Twitter, Inc. Comments in Support of Stage Stores Pet., CG Dkt. No. 02-278 (Aug. 8, 2014); Twitter, Inc. Letter in Support of Rubio's Pet., CG Dkt. No. 02-278 (Sept. 24, 2014); Twitter, Inc. Letter in Support of CBA Pet., CG Dkt. No. 02-278 (Nov. 17, 2014); Twitter, Inc. Notice of Ex Parte Communication, CG Dkt. No. 02-278 (Oct. 31, 2014).

contrary ruling would have the significant and unintended consequence of suppressing a vast amount of desired and socially beneficial speech, a result Congress did not intend when enacting the TCPA.

INTRODUCTION

The TCPA—a well-meaning statute meant to curb abusive telemarketing practices—is increasingly being abused by plaintiffs' lawyers seeking windfall damages from companies that have acted in good faith. Taking advantage of the fact that people sometimes change their cell phone numbers without notifying every business to which they provided the old number, plaintiffs argue that a company (and indeed anyone else) violates the TCPA anytime it calls a cell phone number that has been reassigned to someone else. That is so, plaintiffs say, even if the caller received "prior express consent" to call that number from the prior user of the number, and even if the caller had no idea that the number had been reassigned.

Under this approach, legitimate businesses like Twitter, Blackboard, and countless others risk significant liability every time they send text messages to people who signed up to receive them, turning texting (or calling) those people into a game of chance, with the loser potentially on the hook for $500 to $1,500 per text. Applying the TCPA in this way is irrational, unfair, and raises serious First Amendment problems. Blackboard's petition—and the others like it[4]—provides the Commission an opportunity to fix this lawyer-driven problem by clarifying that the phrase "prior express consent of the called party" in 47 U.S.C. § 227(b)(1)(A) means the express consent of the party the caller intended to call.[5]

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[4] *See supra* note 2.

[5] Although Twitter's comments primarily urge the Commission to interpret the statutory term "called party" to mean the intended recipient of a call, Twitter also supports Blackboard's request that the Commission declare a good faith exemption to TCPA liability for callers who place calls or texts to cell phone numbers that they had previously obtained

BACKGROUND AND SUMMARY OF ARGUMENT

Twitter is a popular social networking and microblogging service that allows users to post short "Tweets" that can be read by other Twitter users. Twitter has millions of users who create and share approximately 500 million Tweets every day on a wide range of matters of public and private concern, from protests in foreign capitals and American streets, to real-time discussions of culture, sports, and news. Twitter users choose how they want to receive Tweets that are posted by others. They can access Tweets via Twitter's website, request to receive them by email, or have Tweets sent to their cell phones as text messages. To do so, they must provide Twitter with their cell phone numbers and expressly request to receive texts at that number.

Sometimes, however, people change cell phone numbers or cancel their phone subscription after having consented to having calls or texts sent to them, but without informing those (like Twitter) to whom they previously gave consent. This can create problems because a given phone number is seldom abandoned, but instead is generally reassigned to a new user. This happens all the time. Indeed, by one estimate, more than 100,000 cell phone numbers are reassigned or "recycled" *each day*.[6] Given the extraordinary volume of recycled numbers, it is inevitable that some cell phone users with new numbers will receive texts or calls that were requested by the person who previously used those numbers. Such messages are easily stopped: in most cases, a simple "STOP" command will suffice.

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consent to call, but which at the time of the call are—unbeknownst to the caller—in use by a different person. *See* Blackboard Pet. at 12-13. The same policy and constitutional considerations discussed herein apply equally with regards to the recognition of a good faith exemption to TCPA claims based on incorrect or recycled numbers.

[6] Stage Stores Pet. at 3.

Unfortunately, however, some owners of recycled numbers have teamed up with the class action bar to take advantage of this unremarkable fact of modern life. By filing TCPA suits seeking to certify classes of all recycled cell phone number owners who received text messages from a given company, these plaintiffs attempt to extract massive settlements from businesses that made every effort to comply with the TCPA by obtaining "prior express consent" to call the numbers they call.

Twitter has been named as a defendant in one such recycled-number class action.[7] And Twitter is hardly alone. There has been an epidemic of TCPA class action lawsuits—over 2,000 filed in 2014 alone[8]—demanding massive windfalls for communications that the TCPA was never intended to cover. As a result of this hyper-litigious environment, innovative companies increasingly must choose between denying consumers information that they have requested or being targeted by TCPA plaintiffs' attorneys filing shake-down suits. No company should be put to such a choice. Indeed, putative TCPA class actions have become such a problem for American businesses that in October 2013, the U.S. Chamber Institute for Legal Reform (an affiliate of the U.S. Chamber of Commerce) issued a report calling for legislative reform to stop the onslaught,[9] and in August 2014, over a dozen members of Congress alerted the Commission to the "significant hindrance to public and private business practices" that the "outdated" TCPA imposes.[10]

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[7] Am. Compl., *Nunes v. Twitter*, No. 14-cv-02843 (N.D. Cal. Sept. 2, 2014) (ECF No. 26).

[8] LeadiD, Cover Your Act: How to Prevent TCPA Litigation, *available at* http://www.leadid.com/infographics/cover-your-act (last visited Apr. 15, 2015).

[9] *See* U.S. Chamber Institute of Legal Reform, *The Juggernaut of TCPA Litigation: The Problem with Uncapped Statutory Damages* (Oct. 23, 2013), *available at* http://www.instituteforlegalreform.com/resource/the-juggernaut-of-tcpa-litigation-the-problems-with-uncapped-statutory-damages (*TCPA Juggernaut*).

[10] Letter from Rep. Marsha Blackburn, et al. to Tom Wheeler, FCC, at 1 (Aug. 1, 2014), *available at* http://www.ballardspahr.com/~/media/files/alerts/2014-08-07-letter1.pdf.

The Commission can remove this dilemma by clarifying that a caller does not violate the TCPA where it has obtained prior express consent from the intended recipient of the call but, unbeknownst to the caller, the cell phone number has subsequently been reassigned to a new subscriber. This interpretation gives the statute's "prior express consent of the called party" language a reasonable, practical interpretation, one that makes it possible for companies to comply with the TCPA and that avoids unconstitutionally chilling a substantial amount of speech protected by the First Amendment.

ARGUMENT

I. Nuisance TCPA Litigation Involving Calls To Reassigned Numbers Is A Burgeoning Problem

The Commission's response to Blackboard's petition should be informed by an understanding of how the TCPA currently is being used to harm American businesses. The TCPA was enacted in 1991 "in response to an increasing number of consumer complaints arising from the increased number of telemarketing calls" that were "a 'nuisance and an invasion of privacy.'" *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) (quoting S. Rep. No. 102-178, at 1 (1991)). Today the statute is invoked in numerous contexts that have nothing to do with telemarketing. As the U.S. Chamber of Commerce recently observed, "[i]t is rare these days to see TCPA litigation brought against its original intended target—abusive telemarketers."[11]

That is especially true with respect to TCPA lawsuits based on calls made to reassigned cell phone numbers. The *Nunes* case filed against Twitter illustrates the problem. Twitter is not a telemarketer. It is a social networking and

[11] *TCPA Juggernaut* at 1.

communications service. Twitter does not send Tweets to users unless they specifically ask to receive them by text and provide Twitter with their cell phone numbers. By design, therefore, Twitter sends text message Tweets only to telephone numbers for which it has received prior express consent. Nevertheless, Twitter has been sued under the TCPA, with the plaintiff seeking statutory damages for each Tweet that was sent to a phone number for which Twitter had received consent but that was then assigned to a new user without Twitter's knowledge. The named plaintiff seeks to represent a class of countless other "victims" who are supposedly entitled to the same windfall. The lawsuit claims that these text messages violate the TCPA because they constitute "call[s]"[12] sent without the "prior express consent of the called party" using an "automatic telephone dialing system."[13] 47 U.S.C. § 227(b)(1)(A)(iii).[14]

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[12] The Ninth Circuit has concluded that SMS messages fall within the scope of "calls" subject to the TCPA. *See, e.g.*, *Satterfield*, 569 F.3d at 954. Twitter disagrees with that ruling and joins Glide Talk's request in a separate petition asking the Commission to examine and clarify this issue. Glide Talk, Ltd.'s Pet. for Expedited Declaratory Ruling, CG Docket No. 02-278, at 6 n.11 (Oct. 28, 2013).

[13] The plaintiffs' bar and an increasing number of courts have adopted an expansive interpretation of the "automatic telephone dialing system" ("ATDS") requirement that would sweep in nearly every smartphone or computer system. Twitter joins the requests of the many petitioners seeking clarification that to qualify as an ATDS the equipment used to send the texts must have the present capacity to generate and dial random or sequential numbers. *See* TextMe, Inc.'s Petition for Expedited Declaratory Ruling and Clarification, CG Dkt. No. 02-278 (Mar. 18, 2014); ACA International's Petition for Rulemaking, CG Dkt. No. 02-278 (Jan. 21, 2014); Glide Talk, Ltd.'s Petition for Expedited Declaratory Ruling, CG Dkt. No. 02-278 (Oct. 28, 2013); Professional Association for Consumer Engagement's Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking, CG Dkt. No. 02-278 (Oct. 18, 2013); YouMail Inc.'s Petition for Expedited Declaratory Ruling, CG Dkt. No. 02-278 (Apr. 19, 2013); Communication Innovators' Petition for Declaratory Ruling, CG Dkt. No. 02-278 (June 7, 2012).

[14] The effects of plaintiffs' misguided interpretation of the TCPA would not be limited just to businesses. Under the approach that plaintiffs favor, "any person" who uses an ordinary cell phone to place a call or send a text is potentially liable for statutory damages. 47 U.S.C. § 227(b)(1). Thus, if Sam tried to call or text an old friend who gave Sam his number, and unbeknownst to him, his friend's cell phone number had been reassigned, he

Many other companies have been sued under this same "gotcha" theory. For example, a plaintiff brought a TCPA class action against Yahoo because he received Yahoo text notifications that the prior user of his cell phone number had asked to receive at that number.[15] Another plaintiff filed a TCPA class action against United HealthCare Services, Inc. after he received a recorded reminder to get a flu shot that had been requested by the prior user of the cell phone number.[16] Yet another plaintiff filed a class action against IvisionMobile, Inc. and Textopoly, Inc. because she received a text message notification of a rewards program requested by the prior user of her cell phone number.[17] These examples are just the tip of the iceberg. Companies in nearly every sector of the economy have been hit with TCPA lawsuits based on calls or texts to cell phone numbers where the companies had obtained prior express consent to call those numbers from the persons they intended to call, but inadvertently reached new subscribers—healthcare providers, banks, debt collectors, insurance companies, cable companies, and social networking services, to name just a few.

The reasons for the explosion in such TCPA litigations are easy to see. The TCPA creates a private right of action along with statutory damages of $500 to $1,500 for each prohibited call, text, or fax. 47 U.S.C. § 227(b)(3). Some courts have not required plaintiffs to prove that they suffered any actual harm, and the statute does not require that the defendant have acted with any culpable intent in order to

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would be liable for a minimum of $500 in statutory damages for accidentally calling or texting a stranger.

[15] *Dominguez v. Yahoo!, Inc.*, 8 F. Supp. 3d 637, 638 (E.D. Pa. 2014) (appeal pending).

[16] *Matlock v. United Healthcare Servs., Inc.*, No. 2:13-cv-02206, 2014 U.S. Dist. LEXIS 37612, at *1-2 (E.D. Cal. Mar. 19, 2014) (stayed).

[17] *See* First Am. Compl. ¶¶ 19, 21, *Snyder v. IvisionMobile, Inc.*, No. 5:13-cv-05946 (N.D. Cal. Apr. 15, 2014) (ECF No. 22) (dismissed pursuant to stipulation).

state a claim. Given this scheme, especially when harnessed to a class action procedure, potential damages in TCPA cases can soar beyond any reason. In the *Nunes* suit against Twitter, for example, the plaintiff is seeking hundreds of millions of dollars.

The massive statutory damages that plaintiffs seek in such TCPA class actions exert an *in terrorem* effect. The risk of a huge judgment puts immense pressure on defendants to settle cases even if they have no merit. Courts have recognized this pattern. *See, e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("[C]lass certification creates insurmountable pressure on defendants to settle, whereas individual trials would not . . . The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.") (citation omitted)); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) ("[Defendants] may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle."). As a result, eye-popping settlements are becoming a reality in TCPA litigation. There have been at least a dozen TCPA settlements of greater than $5 million in the last few years, including several eight-figure settlements in the last year alone.[18] This only encourages more lawsuits.

[18] *See, e.g.*, Order, *Gehrich v. Chase Bank, USA, N.A.*, No. 12-cv-05510 (N.D. Ill. Aug. 12, 2014) (granting preliminary approval to $34 million settlement); *Rose v. Bank of Am. Corp.*, No. 11-cv-02390-EJF, 2014 U.S. Dist. LEXIS 121641 (N.D. Cal. Aug. 29, 2014) (granting final approval to $32 million settlement); Order, *In re Life Time Fitness, Inc. TCPA Litigation*, No. 14-md-02564-JNE-SER (D. Minn. Mar. 9, 2015) (ECF No. 30) (granting preliminary approval to a $10-15 million settlement); *see also TCPA Juggernaut* at 2.

II. Where Cell Phone Numbers Are Reassigned, Companies Cannot Reasonably Avoid Violating The TCPA If They Are Required To Obtain The Prior Express Consent Of The New Subscriber

One reason for the explosion in recycled-number TCPA cases is that companies, even responsible ones, are hard-pressed to avoid placing calls or sending texts to such numbers. When consumers change phone numbers, they often fail to notify every company to which they have previously given their number. Twitter goes to considerable lengths to identify recycled numbers and remove them from its messaging platform. Among other efforts, Twitter obtains information about deactivated numbers from those wireless carriers willing to supply it, and then uses privately purchased data to assess whether the number was reassigned to a new subscriber on the same carrier or ported by the original subscriber to a new carrier. Unfortunately, the information carriers provide arrives at varying or sporadic intervals, and it is not always up to date or complete.

Indeed, as other commenters agree, there is no practical way for businesses that send requested information to consumers by text to learn in real time, and in a comprehensive, definitive way, that a cell phone number is no longer associated with a given user.[19] This problem is particularly acute for a company like Twitter that uses text messaging to deliver Tweets, within seconds of their having been posted, to the millions of users who requested them. In fact, Neustar—the company that many TCPA plaintiffs point to as providing services to avoid liability for calling recycled numbers—has admitted to the Commission that it "is not aware of any telecommunications industry databases that track all disconnected or reassigned telephone numbers," its own products can only help "mitigate [companies'] risk of violating the TCPA," and its service "is not a silver bullet for TCPA compliance but

[19] *See, e.g.*, Stage Stores Pet. at 3; Rubio's Pet. at 3-4; United Healthcare Pet. at 5.

is a tool that companies can use, in conjunction with other services, to reduce their TCPA exposure . . . ."[20]

This reality needs to be considered in applying the TCPA. As the Commission has recognized, the statute cannot "'demand[] the impossible.'"[21] In prior proceedings, therefore, the Commission has worked to "ensure that callers have a reasonable opportunity to comply with [TCPA] rules."[22] Otherwise, "desired information" "communicated through purely informational calls"—including "bank account balance, credit card fraud alert, package delivery, and school closing information"—will be "unnecessarily impede[d]."[23]

Courts wrestling with these issues have suggested a few ways that callers can avoid liability even if the TCPA is read to hold them liable for calling recycled cell phone numbers. *See Soppet v. Enhanced Recovery Co.*, 679 F.3d 637, 642 (7th Cir. 2012). Unfortunately, however, these suggestions are neither reasonable nor realistic for services such as Twitter that send a high volume of requested texts to cell phones every day.

First, the Seventh Circuit suggested that before an automated call is made to a customer, "[h]ave a person make the first call [using non-automated equipment to] verify[] that [the] Cell Number is [still] assigned to [the] Customer." *Id.* To implement this approach, a Twitter employee would need to *manually* call or text

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[20] Neustar, Inc. Ex Parte Letter to FCC, CG Docket No. 02-278 (Feb. 5, 2015). In addition, these services may require the transmission of users' personal information in order to assess whether that information matches that of the subscriber of record. That process implicates user privacy considerations.

[21] *In re Rules & Regulations Implementing the TCPA*, 19 FCC Rcd. 19215, 19219 (2004) ("*2004 Order*") (quoting *McNeil v. Time Ins. Co.*, 205 F.3d 179, 187 (5th Cir. 2000)).

[22] *Id.* at 19,215.

[23] *In re Rules & Regulations Implementing the TCPA*, 27 FCC Rcd. 1830, 1838 (2012).

each user and verify his or her identify before *each* Tweet was automatically sent. Such a verification process would be prohibitively expensive for Twitter, and annoying and an invasion of privacy for Twitter users. Given that Twitter users can follow an unlimited number of other Twitter users and receive all of their Tweets—often dozens or more on a daily basis—Twitter could not possibly implement this suggestion.[24]

Second, the court suggested that defendants could "[u]se a reverse lookup to identify the current subscriber to [the] Cell Number" before placing each autodialed call. *Soppet*, 679 F.3d at 642. But as discussed above, no such automated "reverse lookup" exists. Even if there were such a service, updated in real time, it would only provide a caller with the name of the current subscriber for a phone number. This information would not help a service like Twitter. Twitter does not require its users to provide it with their full names or addresses, and even if it did, the Twitter user associated with a phone number may not be the registered subscriber for the number (*e.g.*, a mother might be the registered subscriber for a number, but her son who actually uses the number may be the Twitter user associated with the number). Regardless, requiring Twitter to check a "reverse lookup" service before facilitating the delivery of a high volume of requested and consensual Tweets each day to cell phones would be unworkable in practice; it would also fundamentally alter the nature of Twitter, which currently enables users to share information nearly instantaneously.[25]

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[24] *See also* Blackboard Pet. at 14-15; United Healthcare Pet. at 5; CBA Pet. at 7-8.

[25] The court's third suggestion only applies to debt collectors and therefore has no application to companies like Twitter. *See Soppet,* 679 F.3d at 642 ("Ask Creditor, who obtained Customer's consent, whether Customer still is associated with Cell Number—and get an indemnity from Creditor in case a mistake has been made.").

In truth, the only way that Twitter can realistically avoid making "calls" to recycled cell phone numbers is simply to stop sending texts altogether. That outcome is bad for both Twitter and its users. Twitter can only imagine the backlash if it announced it was terminating the delivery of Tweets by text to users who asked to receive them that way. In enacting the TCPA, Congress could not have intended for legitimate businesses like Twitter to choose between risking massive liability or denying consumers the chance to receive useful text messages that they have expressly requested. To the contrary, the statute's legislative history makes clear that Congress did not want to inhibit "expected or desired communications between businesses and their customers." H.R. Rep. No. 102-317, at 17 (1991). As it has before, the Commission should act with this principle in mind.

III. Interpreting "Consent Of The Called Party" To Include The Intended Recipient Is Consistent With The TCPA And Needed To Avoid Serious Practical And Constitutional Problems

The TCPA should not expose a company to liability simply because it calls or sends a text to a cell phone number that has been reassigned without its knowledge. The statute certainly does not compel that result, and reading it that way creates significant practical problems that put its constitutionality at risk.

The key provision is section 227(b), which exempts from the TCPA a call "made with the prior express consent of the called party." 47 U.S.C. § 227(b)(1). The TCPA does not define the term "called party," and courts have divided over how to interpret it. Several courts have taken a commonsense approach and held that "called party" refers to the "intended recipient" of the call. *Leyse v. Bank of Am.*, No. 11-cv-7128, 2014 U.S. Dist. LEXIS 125527, at *17 (D.N.J. Sept. 8, 2014); *Cellco P'ship v. Dealers Warranty, LLC*, No. 09-cv-1814, 2010 U.S. Dist. LEXIS 106719, at *34 (D.N.J. Oct. 5, 2010); *Leyse v. Bank of Am.*, No. 09-cv-7654, 2010 U.S. Dist. LEXIS 58461, at *9-11 (S.D.N.Y. June 14, 2010). In contrast, the Seventh and

Eleventh Circuits have held that "called party" refers to "the person subscribing to the called number at the time the call is made." *Soppet*, 679 F.3d at 643; *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014).[26] For a number of reasons, the Commission should adopt the first interpretation. It is most consistent with the statute, allows companies to reasonably comply with the TCPA, and avoids the serious constitutional problems that would result from imposing strict liability on anyone who inadvertently calls a reassigned cell phone number with the consent of the number's prior user.

***First*, the ordinary meaning of "the called party" is the party that a caller intended to reach.** When I dial the phone number that John gave me for the purpose of reaching him, in common parlance I "called" John. That is true even if Jane happens to answer the phone, or even if I accidentally dial the wrong number or if unbeknownst to me John's number has been reassigned to someone else. This commonsense understanding applies with special force to the TCPA because the relevant provision of the statute focuses on the perspective of the caller, not the recipient. The statute makes it unlawful "to *make* any call" other than one "*made* with the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A) (emphases added). It's the *making* of the call that triggers liability, not the *receipt* of the call by someone who hasn't given consent. (Of course, if no one receives the call, no one would have standing to bring a claim.) Accordingly, based on the language of the provision, what matters is what the caller was doing (or believed she was doing) in making the call. And, from the caller's point of view, the "called party" is the

[26] Yet another court concluded that a "plaintiff's status as the 'called party' depends not on such technicalities as whether he or she is the account holder or the person in whose name the phone is registered, but on whether the plaintiff is the regular user of the phone and whether the defendant was trying to reach him or her by calling that phone." *Manno v. Healthcare Revenue Recovery Group, LLC*, 289 F.R.D. 674, 683 (S.D. Fla. 2013).

person she intends to call, based on the knowledge she had at the time the call was made.[27]

***Second*, interpreting "called party" to mean the "intended recipient" of the call makes practical sense.** As explained above, there is no realistic way for companies to be sure that every number they call (based on a user's prior consent) still belongs to that user. Especially given that the TCPA applies not just to telemarketers, but to "any person" who makes "any call" using the requisite equipment (§ 227(b)(1)), it is imperative for callers to be able to reasonably rely on the consent they obtain. If consent is lost through events about which the caller is totally unaware and has no control, every call carries a potential $500 price tag and the consent exception becomes illusory, contrary to the intent of Congress. *See* H.R. Rep. No. 102-317, at 17 (1991) (explaining that the exception was designed to allow companies to send "expected or desired" messages, such as those that "advise a customer (at the telephone number provided by the customer) that an ordered product had arrived, a service was scheduled or performed, or a bill had not been paid"). As the Commission has recognized, "'[i]t is a flawed and unreasonable construction of any statute to read it in a manner that demands the impossible.'" *2004 Order* at 19,219 n.32 (quoting *McNeil*, 205 F.3d at 187).

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[27] In holding otherwise, the Seventh Circuit relied on the fact that the term "called party" is used in other provisions of the TCPA where it seems to refer to the current subscriber. *Soppet*, 679 F.3d at 639-40 ("The presumption that a statute uses a single phrase consistently, at least over so short a span, . . . implies that the consent must come from the current subscriber."). The Supreme Court recently made clear, however, that the assumption that identical words used in different parts of a statute should be given the same meaning "readily yields" where context suggests otherwise. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014). A statutory term "may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." *Id.* (internal quotation marks omitted). That is precisely the situation here: whatever "called party" may mean elsewhere in the TCPA, given the emphasis of the consent provision on the caller's perspective, the term as used there refers to the party the caller intended to reach based on the information the caller had when the call was made.

***Third*, the alternative interpretations of "called party" produce bizarre results that Congress did not intend.** As noted, if the "called party" is not the person the caller is actually trying to reach, it is either (1) the actual recipient of the call, or (2) the subscriber. Neither makes sense. Under the first approach, whether a call violates the statute would turn on the happenstance of who ends up receiving it. A legitimate call to someone who gave consent would become unlawful if a friend or relative answered the phone. But "it would be absurd to allow any person who happens to pick up the phone to sue for damages for a violation of the TCPA." *Leyse*, 2010 U.S. Dist. LEXIS, at *14. The second interpretation leads to equally anomalous results: a violation could occur even where the person who received the call had consented but the actual subscriber (the person who pays the bill) did not. That would make TCPA violations nearly unavoidable in scenarios, increasingly common, where the actual user of a cell phone is not technically the subscriber, such as where a company purchases a cell phone plan for its employees.[28] On this approach, "a business [would] have to inquire as to whether a person giving the business express prior consent is in fact the person whose name is on the telephone bill" (*Leyse*, 2010 U.S. Dist. LEXIS, at *15)—a monumentally burdensome requirement that serves no public good.

***Fourth*, imposing liability for calls made to recycled cell phone numbers would have serious practical consequences for legitimate businesses**. Faced with the prospect of massive liability even when they make good-faith efforts to comply with the statute, companies like Twitter may have no choice but to cease using text messaging to communicate with their users. That is so

[28] *See, e.g.*, *Jordan v. ER Solutions, Inc.*, 900 F. Supp. 2d 1323, 1326-27 (S.D. Fla. 2012) (rejecting TCPA claim where phone was registered to husband, but wife used phone and consented to be called).

even though the overwhelming majority of those messages would go to users who have specifically requested them and would be upset if they stopped. The TCPA should not be construed to bring about such a counterintuitive and counterproductive result.

***Finally*, to apply the consent provision this way would create substantial constitutional problems.** If the TCPA is read so that liability is unavoidable even if the caller has a reasonable and good-faith belief that the called party has consented, the TCPA would become an especially pernicious kind of strict-liability provision: one where the line between a legal and illegal message would be completely out of the speaker's hands, a matter of sheer luck. A person could make every effort to comply with the statute, could carefully limit calls to numbers for which express consent has been obtained, only to find itself liable through circumstances that were unknown and out of its control. This unfairness would likely render the statute unconstitutional as applied to recycled numbers.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox TV Stations*, 132 S. Ct. 2307, 2317 (2012). This due process rule ensures "that regulated parties should know what is required of them so they may act accordingly." *Id*. If consent evaporates the second a phone number is reassigned, callers have no realistic way of knowing whether a given call is permissible at the time the call is made. That is untenable: due process does not permit civil liability to be turned into a roll of the dice.

This is a serious concern because the TCPA touches on "'sensitive areas of basic First Amendment freedoms.'" *Id*. at 2318 (quoting *Baggett v. Bullitt*, 377 U. S. 360, 372 (1964)). Indeed, the communications that would be proscribed or silenced if

the statute is read to impose strict liability for calls to reassigned cell phone numbers may include speech on significant public issues,[29] or truthful speech about a company's products or services.[30] Either way, imposing TCPA liability on entities that inadvertently call reassigned numbers would necessarily chill a wide range of fully protected speech.

It is settled law that "any statute that chills the exercise of First Amendment rights must contain a knowledge element." *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 690 (8th Cir. 1992) (emphasis omitted).[31] The TCPA directly regulates speech, and construing it to impose liability based on a fortuity "runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedom[] of speech" and "may lead to intolerable self-censorship." *Gertz v. Robert Welch*, 418 U.S. 323, 340 (1974). Indeed, faced with the prospect of significant liability even when they make good-faith efforts to do what the law requires, companies like Twitter and Blackboard may have no choice but to stop using text messaging to enable their users' communications. The result would be to deter a wide variety of legitimate communications, including matters of public concern.

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[29] *See Connick v. Myers*, 461 U.S. 138, 145 (1983) ("speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection" (internal quotation marks and citation omitted)).

[30] *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762-66 (1976) (commercial speech entitled to First Amendment protection).

[31] *See also, e.g.*, *Smith v. California*, 361 U.S. 147, 152-54 (1959) (observing that to eliminate "the mental element in an offense" is to "stifle the flow of democratic expression and controversy at one of its chief sources" (internal citation omitted)); *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 611 (6th Cir. 2005) (strict liability laws "may 'have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it'" (citation omitted)); *In re Grand Jury Matter, Gronowicz*, 764 F.2d 983, 988 (3d Cir. 1985) (en banc) ("The scienter requirements forbid the enforcement of overbroad statutes that subject an author to sanctions arising from innocent errors of fact, because such sanctions may have a chilling effect on protected speech.").

These communications would be silenced even though nearly all of them are directed at people who requested them, and want them to continue. The First Amendment demands a different result. An approach that imposes liability on anyone who unwittingly calls a reassigned cell phone number makes the line between permissible and impermissible speech too precarious. This chokes off the "breathing space" that is "essential" to "fruitful exercise" of constitutional freedoms. *Id.* at 342.[32]

The "cardinal principle" of statutory interpretation is that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Here, construing the TCPA to require consent of the person who happens to pick up the phone, or the subscriber of the number called regardless of who uses that number, would seriously risk rendering the statute unconstitutional by turning liability into a game of chance and silencing protected communications. The Commission must reject that reading.[33]

For all of these reasons, the Commission should clarify that a person does not violate the TCPA simply by calling a reassigned number. So long as the intended

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[32] *See also Video Software Dealers*, 968 F.2d at 691 ("Because the statute's strict liability feature would make video dealers more reluctant to exercise their freedom of speech and ultimately restrict the public's access to constitutionally protected videos, the statute violates the First Amendment." (emphasis omitted)).

[33] *Cf. Manual Enters., Inc. v. Day*, 370 U.S. 478, 492-93 (1962) (a "substantial constitutional question would arise" if a federal statute were to be read "as not requiring proof of scienter in civil proceedings," because that would lead to self-censorship and "deprive such materials, which might otherwise be entitled to constitutional protection, of a legitimate and recognized avenue of access to the public").

recipient provided prior consent and the caller lacked knowledge of the reassignment, the caller should not be on the hook for statutory damages.

CONCLUSION

By clarifying that the phrase "prior express consent of the called party" includes consent from the party the caller intended to reach, even if the number has been reassigned, the Commission would take a significant step towards providing certainty to technology companies so that they can continue developing innovative ways for consumers to communicate and share information through text messaging.

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Respectfully submitted,

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